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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: AMI Construction

File: B-286351

Date: December 27, 2000

Craig W. Kidwell, Esq., Marvel & Kump, Ltd., for the protester.
Annejanette Kloeb Heckman, Esq., Department of Agriculture, and Laura J. Mann, Esq., Small Business Administration, for the agencies.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's reliance on information in the Small Business Administration's (SBA) PRO-Net database to determine that the protester, which certified itself in its bid as an eligible HUBZone small business concern, was not small and thus was not eligible for a HUBZone evaluation preference was improper because such questions must be referred to the SBA under applicable regulations where the agency does not believe it can or should accept the bidder's self-certification.

DECISION

AMI Construction protests the award of a contract to N.A. Degerstrom, Inc. under invitation for bids (IFB) No. R4-17-00-10, issued by the United States Department of Agriculture, Forest Service, for mine reclamation work.

We sustain the protest.

The IFB, issued on August 16, 2000, was for mine reclamation work at the Aurora Partnership Mine, an abandoned cyanide heap leach facility, in the Humboldt-Toiyabe National Forest, Mineral County, Nevada. The IFB schedule requested prices for 12 line items of work (totaled into a base bid) and for an additive item.

Section I.2(b) of the IFB stated that "offers will be evaluated by adding a factor of 10 percent to the price of all offers except . . . offers from HUBZone small business

concerns that have not waived the evaluation preference.”¹ A HUBZone small business concern was defined in the IFB as one that appears on the list maintained by the Small Business Administration (SBA).² IFB § I.2(a). The IFB incorporated standard industrial classification (SIC) code 1629, which stated the applicable small business size status standard as not more than an average of \$17 million in annual receipts for the preceding 3 fiscal years. IFB § K.6.

On August 25, the SBA certified AMI as a qualified HUBZone small business concern under SIC code 1629 and advised AMI that it was “eligible to receive HUBZone contracting opportunities, and [would] be included in the listing of qualified HUBZone small business concerns found on the Internet at <http://www.sba.gov/hubzone>.” The SBA also advised AMI:

We note that your firm has registered in SBA’s PRO-Net system.³ In order to receive maximum benefit from the HUBZone Empowerment Contracting Program it is strongly suggested that you update your firm’s profile in PRO-Net. PRO-Net is a premier marketing tool for small businesses seeking to do business with the Federal government. It is also a source that Federal agencies will check to determine if your firm has been certified by SBA and eligible to receive contracts under the HUBZone program.

Forest Service Report, Tab F, Letter from SBA to AMI, Aug. 25, 2000.

Nine bids in response to the IFB were opened on September 11. Degerstrom’s base bid price was the lowest at \$686,564.80 and AMI’s base bid price was next lowest at

¹ This implements the 10 percent HUBZone small business concern evaluation preference provided by 15 U.S.C. § 657a(b)(3) (Supp. IV 1998).

² Under the Small Business Act, 15 U.S.C. § 632(p)(1), a HUBZone (a historically underutilized business zone) “means any area located within 1 or more-- (A) qualified census tracts; (B) qualified nonmetropolitan counties; or (C) lands within the external boundaries of an Indian reservation.” This section defines HUBZone small business concern as “a small business concern-- (A) that is owned and controlled by 1 or more persons, each of whom is a United States citizen; and (B) the principal office of which is located in a HubZone.” The SBA is required to establish and maintain a list of qualified HUBZone small business concerns. 15 U.S.C. § 632(p)(5)(D).

³ As explained on its website, <<http://pro-net.sba.gov>>, “PRO-Net is an electronic gateway of procurement information--for and about small businesses. It is a search engine for contracting officers, a marketing tool for small firms and a ‘link’ to procurement opportunities and important information. It is designed to be a ‘virtual’ one-stop-procurement-shop.”

\$744,418.16.⁴ The government base bid estimate was \$609,808. In its bid, AMI certified that it met the HUBZone small business concern classification. If the 10 percent preference was applied, AMI's base bid price was the lowest.

To determine whether AMI was entitled to the HUBZone evaluation preference, the Forest Service researched the SBA's PRO-Net database, which identified AMI's status as a HUBZone small business concern but did not identify that it was qualified under SIC code 1629. According to the Forest Service, the local SBA office advised the contracting officer that HUBZone small business concerns must meet the applicable SIC code to qualify for a HUBZone preference. Based on the foregoing, the Forest Service determined that AMI did not meet the IFB's small business size standard and thus was not eligible for the HUBZone preference. Forest Service Report at 2. After determining that Degerstrom's base bid price was fair and reasonable, the Forest Service made award to that firm on September 15. This protest followed.

AMI protests that it is a certified HUBZone small business concern eligible under SIC code 1629 and that the agency improperly failed to accept AMI's certification and did not apply the HUBZone preference which would have made AMI the low bidder.

Because this protest raised issues within the purview of the SBA, our Office requested that the SBA comment on the protest. In its submission, the SBA pointed out that the determination of whether a firm is small for purposes of a particular procurement is separate from the determination of whether the firm is a qualified HUBZone small business concern (although the latter does include a determination that the firm is small for purposes of its primary industry classification). See 13 C.F.R. § 126.203 (2000). The contracting officer here appears to have treated the two determinations as one. There is no dispute, however, about whether AMI was a HUBZone small business concern, since the contracting officer was aware that AMI's name appeared on the SBA's list of qualified HUBZone small business concerns. The HUBZone issue is thus irrelevant to this case, which turns solely on the contracting officer's authority to reject a firm's self-certification as to its size status for purposes of a specific procurement. Here, the contracting officer was unwilling to accept AMI's self-certification in its bid because the SIC code that applied to this particular procurement did not appear on the SBA's PRO-Net listing for AMI. However well intentioned the contracting officer's action, it was an improper usurpation of the SBA's authority.

The SBA, not the procuring agency, has conclusive authority to determine size status matters for federal procurements.⁵ 15 U.S.C. § 637(b)(6). According to FAR § 19.301,

⁴ There were insufficient funds to award the additive item.

⁵ Similarly, the SBA is the designated authority for determining whether a firm is an eligible HUBZone small business concern, and it has established procedures for
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an offeror may self-certify that it is a small business concern in connection with a specific solicitation if it meets the definition of a small business concern applicable to the solicitation and has not been determined by SBA to be other than a small business; the contracting officer must either accept the firm's self-certification or (if the self-certification is challenged or the contracting officer has reason to question the representation) refer the matter to the SBA; the contracting officer does not have authority to reject the self-certification.⁶ See MTB Invs., Inc., B-275696, Mar. 17, 1997, 97-1 CPD ¶ 112 at 2-3.

The Forest Service argues that it acted reasonably in denying AMI the HUBZone evaluation preference because the agency relied upon PRO-Net, which did not affirmatively indicate that AMI was a small business concern for SIC code 1629, and upon SBA's advice, and asserts further that AMI is to blame since it neglected to update its PRO-Net profile as suggested by the SBA.⁷ Forest Service Report at 4-10; Supplemental Forest Service Report at 2. While an agency may find it helpful to review the PRO-Net site, that review is not an adequate substitute for referral to the SBA; the procuring agency does not have the authority to rely upon the PRO-Net site to reject a bidder's self-certification of its status.⁸ Even if we assume, for purposes of this discussion, that the contracting officer received the advice from local SBA officials as reported by the Forest Service, that advice could not waive the statutory and regulatory requirement that size (and HUBZone) status matters be referred to the SBA for resolution where a contracting officer is unwilling to accept an offeror's self-certification.

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interested parties, including procuring agencies, for challenging a bidder's self-certification. 15 U.S.C. §§ 632 (p)(5)(A), 657a (c)(1); 13 C.F.R. §§ 126.503, 126.801; Federal Acquisition Regulation (FAR) §§ 19.306, 19.1303.

⁶ Similarly, under FAR § 19.306, the only way for a contracting officer to call into question an offeror's HUBZone status is to protest to the SBA.

⁷ The Forest Service also argues that the protest should be dismissed because our Office should not be the forum to review the proper operation of PRO-Net. We view the protest, however, as questioning the agency's decision to unilaterally reject AMI's self-certification as to its size, not the operation of PRO-Net.

⁸ Citing a number of our decisions, e.g., Adams Indus. Servs., Inc., B- 280186, Aug. 28, 1998, 98-2 CPD ¶ 56, the Forest Service argues that the agency has the discretion not to refer questions concerning a bidder's size to the SBA. The cases cited, however, concern an agency's decision to accept an offeror's self-certification and therefore not to refer a small business size question to the SBA; the cases cannot be read to permit an agency to unilaterally reject a firm's self-certification without referring the matter to the SBA.

We therefore conclude, and the SBA confirmed in its submission to our Office, that AMI was entitled to the 10 percent evaluation preference in this procurement. Under 15 U.S.C. § 657a(b)(3), a bid which is low by virtue of the HUBZone evaluation preference “shall be deemed as being lower than the price offered by another offeror.” Here, AMI’s bid is low after applying the 10 percent evaluation preference to Degerstrom’s bid.

The Forest Service nevertheless contends that when it determined that AMI was not entitled to the evaluation preference, it also determined that AMI’s bid was unreasonably high, so that AMI’s bid would have been rejected for this reason in any case. See Contracting Officer’s Statement at 2-3; Forest Service Report, Tab L, Bid Evaluation Document, at 2.

While an agency can reject a bid pursuant to FAR § 14.404-2(f) where it reasonably determines the total bid price is unreasonably high, where, as here, that bid is the low bid under the IFB after considering an applicable evaluation preference, we view it as improper to then award on the basis of a yet higher evaluated bid, even though the actual price of that bid is lower than the low evaluated bid. Cf. The Sandtex Corp., B-224527, Jan. 30, 1987, at 1-2, 4 (agency reasonably cancelled solicitation even though foreign bid price was apparently reasonable, where domestic bid prices were unreasonably high and, once Buy American Act evaluation factor was added to foreign bid price, it was higher than domestic bids). As the SBA pointed out in its submission, if an agency could reject, as unreasonably high, a bid which was low by virtue of the application of the HUBZone evaluation preference in order to make award on the basis of a bid that had a higher evaluated, but lower actual, price, the purpose of the evaluation preference in 15 U.S.C. § 657a(b)(3) would be thwarted. SBA Submission at 8. In other words, if the agency reasonably determined that AMI’s bid price was unreasonably high,⁹ it could not make award under the IFB to Degerstrom (whose evaluated price was higher), and that award is improper. We therefore sustain the protest.

Since the Forest Service reports that the contract is more than 95 percent complete, we do not recommend disturbing the award. Instead, we recommend that AMI be reimbursed its bid preparation costs as well as the costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. §§ 21.8(d)(1), (2) (2000). The

⁹ In supporting its claim that AMI’s bid was unreasonably high, the agency specifically claimed that AMI’s bid for three line items greatly exceeded the government’s estimate for these line items and were thus unreasonably high. However, given that AMI’s total price for these three items is actually less than Degerstrom’s assertedly reasonable price for these items, this agency claim cannot form a basis for determining AMI’s bid unreasonably high, particularly given AMI’s un rebutted assertions that some necessary costs elements were not included in the government’s estimate. See Amendment to Protest (Oct. 19, 2000).

protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
Acting General Counsel